

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ICS CYBERNETICS, INC.

Debtor

CASE NO. 88-00478

Chapter 11

NATIONAL WESTMINSTER BANCORP
N.J., as Successor-in-interest
to First Jersey National
Corporation,

Plaintiff

vs.

ADV. PRO. NO. 88-0114

ICS CYBERNETICS, INC., THE
OFFICIAL COMMITTEE OF CREDITORS
HOLDING UNSECURED CLAIMS OF ICS
CYBERNETICS, INC., ROCHESTER
COMMUNITY SAVINGS BANK, LEFAC
INTERNATIONAL S.A., and
INTEGRATED COMPUTER SYSTEMS
AKTIEBOLEG,

Defendants

ICS CYBERNETICS, INC. and
THE OFFICIAL COMMITTEE OF
CREDITORS HOLDING UNSECURED
CLAIMS OF ICS CYBERNETICS, INC.,

Plaintiff

vs.

ADV. PRO. NO. 89-0036

LEFAC INTERNATIONAL,

Defendant

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein several motions filed by National Westminster Bancorp N.J. as successor-in-interest to First Jersey National Corporation ("NatWest"), the Debtor, ICS Cybernetics, Inc. ("Debtor") and Lefac International, S.A. ("Lefac").

The motions filed by NatWest seek primarily to modify and/or clarify this Court's Order of November 23, 1992 pursuant to Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 7052, 9023 and 9024 and Federal Rules of Civil Procedure ("Fed.R.Civ.P") 52, 59 and 60. The cross-motions of Lefac seek to compel NatWest's escrow agent, Menter, Rudin & Trivelpiece, P.C. ("Menter") to pay over the escrowed funds in accordance with a settlement agreement approved by the Court in its November 23, 1992 Order and to declare a default rate of interest recommenced running against NatWest as of November 23, 1992. The Debtor's cross-motion joins NatWest in its request that the Court's Order of November 23, 1992 be clarified, but only to the extent that it releases the Debtor from any claims of NatWest. Additionally, Debtor opposes NatWest's request to set aside \$30,000 as security for future attorneys' fees and joins Lefac in requesting payment of the escrow funds pursuant to the previously approved settlement agreement.

All of the foregoing motions were argued at a motion term of this Court held at Syracuse, New York on January 12, 1993. Thereafter, the Court reserved decision. In addition to the movants, Debtor's Creditors' Committee filed a Response and appeared in opposition to NatWest's motion.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over this adversary proceeding. See In re ICS Cybernetics, Inc., 123 B.R. 467, 472 (Bankr. N.D.N.Y. 1989), aff'd 123 B.R. 480 (N.D.N.Y. 1990), aff'd No. 90-5057 (2d Cir. Jan. 10, 1991).

FACTS

On or about May 5, 1987, NatWest's predecessor in interest, First Jersey, entered into a Master Agreement of Lease ("Master Agreement") with the Debtor. On the same date, First Jersey and the Debtor executed Equipment Schedule #1 which related to certain items of computer hardware (the "Equipment") to be leased to First Jersey for a period of forty-eight months.

On July 6, 1987, the Debtor informed First Jersey that it had assigned all of its rights in Equipment Schedule #1 to Lefac in consideration of Lefac's extension of financing and instructed First Jersey to remit all sums due and payable under said Schedule to Lefac. Thereafter, First Jersey acknowledged receipt of the assignment.

On March 31, 1988, the Debtor filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") and on or about June 1, 1988 First Jersey, hereinafter referred to as NatWest, ceased making payments due under Equipment Schedule #1 to Lefac and escrowed the payments due under that Schedule. On November 18, 1988, NatWest commenced the instant interpleader adversary proceeding against the Debtor, the Committee, Rochester Community Savings Bank ("RCSB"), Lefac and Integrated Computer Systems, Aktieboleq ("ICS-AB").

In their respective Answers, the Debtor, the Committee and Lefac asserted various cross-claims against each other, and counterclaims against NatWest. ICS-AB never appeared in this adversary proceeding and NatWest never filed a reply to the various counterclaims.

In or about March 1992, Lefac, the Debtor and the Committee entered into a Settlement Agreement whereby NatWest would pay over to Lefac the approximate sum of \$1,500,000 from an escrow account maintained by Menter, which account represents the balance of payments that NatWest would have made on account of Equipment Schedule #1 during the period July 1988 through June 1991.

In turn, Lefac would then pay to the Debtor any amount by which the amount in the escrow account exceeds \$1,100,000. The Settlement Agreement, while providing for a dismissal of the adversary proceeding, with prejudice, as between the settling parties, did not release any claims they have against third parties, to include NatWest, and specifically reserves Lefac's counterclaims against NatWest under the Master Agreement and Equipment Schedule #1.

A hearing on the Debtor's and the Committee's motion to approve the Settlement Agreement was scheduled for April 28, 1992. NatWest opposed the settlement and has cross-moved for attorney's fees.

Additionally, Lefac moved, on April 22, 1992, for an order granting a default judgment against NatWest on its counterclaims, or in the alternative, for summary judgment. That motion was argued on May 12, 1992.

As indicated, all of the aforementioned motions were disposed of by virtue of this Court's November 23, 1992 Order.

ARGUMENTS

At oral argument, NatWest argued that it should be permitted to retain at least \$30,000 of the escrowed funds in order to insure payment of its attorneys's fees to be subsequently awarded by this Court.

Additionally, NatWest seeks a clarification and modification of the November 23, 1992 Order to the extent that it provides for NatWest to be released from any liability arising out of Equipment Schedule #1, to include escrowed rental payments excepting only Lefac's severed claims for late charges and/or attorney's fees.

Finally, NatWest seeks a determination that it be permitted to offset the interest accrued on the escrowed funds against any recovery Lefac may obtain on its severed claims, which were initially scheduled for trial before this Court on February 3, 1993.

Lefac contends that NatWest's motion fails to allege any procedural basis for this Court to reconsider its November 23, 1992 Order. It further points out that a retention of some \$30,000 of the escrowed funds to insure payment of NatWest's attorney's fees "brings a new definition to the term

nominal" utilized by the Court in its November 23, 1992 Order as characterizing the fees to which NatWest would be entitled. (See Lefac's Opposition dated December 21, 1992 at para. 7). Lefac asserts that this portion of the NatWest motion is designed to harass the Debtor and Lefac into concessions. Id. at para. 11.

Lefac observes that NatWest, rather than submitting an amended fee application in compliance with the November 23, 1992 Order, has simply delayed and now seeks to be rewarded for that delay by forcing a \$30,000 "carve out" from the escrowed funds until NatWest gets around to filing that amended fee application

With regard to the releases sought by NatWest, Lefac argues that it is NatWest's intent to ultimately be released from all of the consequences of its default under Equipment Schedule #1 to include its liability to Lefac for all rental payments, late charges and attorney's fees.

In response to NatWest's request that it be permitted to offset the interest generated by the escrow funds, Lefac asserts that NatWest falsely misstates an earlier ruling of the Court in this interpleader adversary proceeding regarding RCSB.

Affirmatively, Lefac alleges that Menter, as escrow agent, has refused to turn over the escrowed funds pursuant to the Settlement Agreement in violation of its fiduciary duty, that the default interest should again begin to accrue from November 23, 1992 forward, and that Menter should be compelled to prove that any use tax payment co-mingled with the escrow funds has been paid out to the appropriate taxing authorities.

The Debtor's cross motion joins with Lefac in seeking to compel NatWest to turn over the escrowed funds, and indicates a willingness to release NatWest from any and all claims the Debtor may have in return for a mutual release from NatWest. The Debtor appears to oppose any offset by NatWest of the interest on the escrowed funds, and echoes Lefac's objection to the \$30,000 attorney's fee carve out.

The Creditors' Committee objects to NatWest's request to offset the interest on the escrowed funds, asserting that the interest accrual was a significant component in fashioning the Settlement Agreement between Debtor, the

Committee and Lefac.

DISCUSSION

Distilled to its simplest terms, NatWest's motion, which it contends is based upon Fed.R.Bankr.P. 7052, 9023 and 9024, incorporating by reference Fed.R.Civ.P. 52, 59 and 60, seeks (1) a release of all liability to the Debtor, (2) release of any and all liability to Lefac for any claim to rental payments arising out of Equipment Schedule #1, (3) limitation on Lefac's counterclaims to late charges and attorney's fees, (4) the authority to set off any and all interest accrued on the escrowed funds against any recovery of late charges and attorney's fees by Lefac on its counterclaim, and (5) retention of \$30,000 from the escrowed funds to be utilized in payment of any attorney's fees awarded to NatWest as the interpleader stakeholder.

Lefac contends, and perhaps correctly, that NatWest's motion is procedurally improper as to all of the relief sought with the possible exception of a release of all liability of NatWest to the Debtor. Lefac asserts that the motion is motivated by NatWest's desire to get "another bite of the apple", rather than the correction of any mistake made by the Court in its November 23, 1992 Order.

While Lefac may be correct, regardless of whether the relief sought is truly by way of reconsideration or is simply intended to cover certain matters inadvertently omitted from the prior motions, the Court will deal with NatWest's current motion on its merits.

With regard to NatWest's request that it be released from any and all liability to the Debtor, arising out of Equipment Schedule #1, there does not seem to be any dispute. Debtor simply seeks a mutual release from NatWest. At oral argument, both NatWest and the Debtor appeared to be in agreement. Excluded from any such mutual releases would, of course, be NatWest's general unsecured claim against Debtor in the sum of \$1.6 million dollars upon which Debtor contends NatWest has already received a 43% distribution.

Turning to NatWest's contention that it should have been released from any liability for rental payments arising out of Equipment Schedule #1, the

parties agreed, at oral argument, that upon the assumption that NatWest had in fact escrowed all the rental payments due under the Equipment Schedule, that neither the Debtor nor Lefac sought any additional or duplicate rental payments. However, in light of the fact that the escrowed rental payments have not yet been disbursed by Menter as escrow agent, any release would be premature.

The remaining modifications and/or clarifications of this Court's November 23, 1992 Order sought by NatWest, however, are in significant dispute. First, NatWest contends that it is entitled to a credit or an offset for the interest earned on the escrowed funds against any amounts for which it is found to be liable on Lefac's counterclaim. Lefac, the Debtor and the Creditors' Committee object to any such application of the interest on the escrowed funds.

NatWest asserts incorrectly that this Court allowed a similar application with regard to the claim of RCSB in its February 26, 1990 Order. As Lefac points out, NatWest was allowed to retain the escrow interest allocable to RCSB's share of the interpleader fund only because RCSB consented to it and this Court clearly expressed its view that absent RCSB's consent, NatWest would receive a windfall if allowed to retain that portion of the escrow interest. (See Memorandum-Decision, Findings of Fact, Conclusions of Law and Order dated February 26, 1990 at pages 12-13).

The Creditors' Committee contends that the Debtor's receipt of a portion of the escrow interest was a material fact it relied upon in reaching its settlement with Lefac and to permit NatWest to retain the escrow interest would seriously undermine that Settlement Agreement which has already been approved by this Court.

NatWest seeks to somehow co-mingle its role as interpleader stakeholder with that of defendant on Lefac's counterclaim, which arises out of NatWest's alleged breach of the so-called "hell or high water" clause in relation to Equipment Schedule #1, which occurred prior to the commencement of this interpleader adversary proceeding.

As Lefac observes, this Court previously passed upon this same argument asserted by NatWest in its Order of February 26, 1990, concluding that NatWest could not offset escrow interest against any claim by RCSB for 2% late charges. There, however, RCSB consented to NatWest's withholding of the escrow

interest. That is not the case here.

Thus, the Court concludes, as it did with regard to the claim of RCSB, that NatWest cannot seek a credit for or set off of the escrow interest against any default damages Lefac may recover on its counterclaim against NatWest.

NatWest also seeks to set aside \$30,000 from the escrowed funds to pay any attorney's fees that this Court might ultimately award NatWest as the interpleader stakeholder.

In its Order of November 23, 1990, the Court denied NatWest's cross-motion requesting costs, disbursements and reasonable attorney's fees without prejudice, subject to NatWest's re-filing of contemporaneous time records in the appropriate form.

Rather than immediately re-filing its fee request, NatWest now seeks to retain \$30,000 of the escrowed funds as some type of security for the payment of its fees, if and when it decides to re-file its fee request, and if and when this Court awards it any fees.

Lefac objects to this relief arguing initially that it does not meet the procedural requirements of Fed.R.Bank.P. 9023 and 9024 and further that \$30,000 far exceeds any conceivable award that this Court might make based upon the time expended by NatWest in connection with the Lefac portion of the interpleader adversary proceeding. Both the Debtor and the Creditors' Committee join Lefac in this objection.

Based upon this Court's finding in its Order of November 23, 1992, and NatWest's delay in re-submitting its fee request, this Court will modify the aforementioned Order to permit NatWest to withhold \$10,000 for a period of sixty (60) days from the date of entry of this Order. In the event that NatWest has not obtained an award of attorney's fees, costs and disbursements from this Court by that date, NatWest, or its escrow agent Menter, will pay over the sum of \$10,000, together with accrued interest, pursuant to the terms of the Settlement Agreement approved pursuant to the Order dated November 23, 1992.

Finally, Lefac, in its cross-motion, seeks an order from the Court that in the event it is determined to be entitled to the 2% late charges against NatWest, that such late charge or default interest be deemed to have commenced

running again effective November 23, 1992. Additionally, Lefac seeks proof that any use taxes paid into the escrow account have been disbursed to the appropriate taxing authorities or that proper provision has been made for their payment.

Upon consideration, the Court believes that both of the aforementioned requests of Lefac should be granted.

Based upon the foregoing, this Court's Order of November 23, 1992 is modified and supplemented as follows:

ORDERED that Natwest's motion insofar as it seeks to be released and discharged from all liability to the Debtor arising out of Equipment Schedule #1 is granted; and it is further

ORDERED that Debtor's cross-motion to the extent that it seeks a release from any and all claims of NatWest, except the general unsecured claim of NatWest in the approximate sum of \$1.6 million, on which partial distribution has already been made is granted; and it is further

ORDERED that NatWest's motion insofar as it seeks a release from Lefac as to all claims for rental payments arising out of Equipment Schedule #1 is granted, upon the condition that all such payments have been paid to the escrow agent and said payments are disbursed by the escrow agent in accordance with the Settlement Agreement approved by Order of this Court dated November 23, 1992; and it is further

ORDERED that NatWest's motion insofar as it seeks to limit Lefac's counterclaims to late charges and/or attorney's fees, and to offset or take a credit for interest which has accrued on the escrow fund is denied; and it is further

ORDERED that NatWest's motion insofar as it seeks to withhold the sum of \$30,000 from the escrow fund subject to NatWest's re-application for fees, costs and expenses as interpleader stakeholder is granted but only to the extent of \$10,000, to be held in an interest bearing account for a period of sixty (60) days from the date of entry of this Order or until an earlier order of this Court awarding such fees, costs and expenses; and it is further

ORDERED that upon the expiration of sixty (60) days or an earlier order of this Court, said sum, or the balance thereof if any, shall be disbursed in accordance with the Settlement Agreement, and it is further

ORDERED that Debtor and Lefac's cross-motion insofar as they seek an order compelling the escrow agent Menter to disburse funds in accordance with the Settlement Agreement, less \$10,000, but inclusive of all accrued interest earned on said escrow fund, is granted; and it is finally

ORDERED that Lefac's cross-motion insofar as it seeks a declaration that the default rate of interest of 2% per month recommenced accruing on November 23, 1992 on any unpaid principal is granted subject, however, to a determination of this Court that Lefac is entitled to such interest.

Dated at Utica, New York

this day of February 1993

STEPHEN D. GERLING
U.S. Bankruptcy Judge